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IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-230

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

WESLEY GROCE,
Respondent.

On Petition for Review of the Judgment of the Supreme Court of Pennsylvania, Nos. 41, and 45 Through 50, January Term, 1972.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

The petitioner, the Commonwealth of Pennsylvania, prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of Pennsylvania rendered in these proceedings on May 4, 1973.

OPINIONS BELOW.

The Opinion of the Supreme Court of Pennsylvania with dissenting Opinion, the Opinion of the Court of Common Pleas of Delaware County, Pennsylvania—Criminal Division appear at Appendix, *infra*, pp. A1 et seq.

JURISDICTION.

The judgment of the Supreme Court of Pennsylvania was entered on May 4, 1973. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257(3).

QUESTION PRESENTED.

The Supreme Court of Pennsylvania reversed the conviction of the respondent for murder holding that prejudicial evidence was introduced at trial of prior involvement of the respondent with the law.

The question arising before your Honorable Court is:

1. Whether the Supreme Court of Pennsylvania erred in holding that a police witness in testifying that the name of one "Nino" had been heard by the witness in his professional work and had associated that name with that of respondent deprived the respondent of his rights to due process and a fair trial.

CONSTITUTIONAL PROVISIONS INVOLVED.

The Constitution of the United States, Amendment XIV Sec. 1.

> ". . . nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

STATEMENT OF THE FACTS.

On April 7, 1969, sometime after 8:30 P. M. a seminarian, John Courtney and a lawyer, Joseph O'Brien, were assaulted in an attempted robbery as they walked down a street in Media, Pennsylvania. The assault occurred across from the Delaware County Court House. Mr. O'Brien was shot and stabbed. Courtney was shot in the course of the attempted holdup. Courtney died as a result of a gunshot wound. O'Brien survived.

On April 9, 1970, the defendant Wesley Groce, respondent herein, was arrested. In addition, Alan Pierce and Ronald Jones were arrested as participants in the crime.

At the trial of Groce, the Commonwealth proved that on the date and time noted above, Courtney and O'Brien were walking south on the east side of Olive Street and were approached by three negro youths who stopped alongside them. One of the black youths demanded that the two whites put their money on the ground or uttered words to that effect. Courtney and O'Brien moved to walk away. O'Brien was grabbed from behind and stabbed in the back by the respondent herein, Wesley Groce. The respondent used an ice pick to stab the victim, Mr. O'Brien. O'Brien fell to the ground. Almost simultaneously, one of the other black youths shot John Courtney twice, taking deliberate

aim for the second shot, and then fired another bullet into O'Brien's chest. The bullet fired by Pierce caused wounds which resulted in Courtney's death on May 18, 1969. After the incident, the three youths removed themselves to a vehicle and fled the area. Mr. O'Brien was temporarily paralyzed as a consequence of his wound. After assistance came, an ice pick was found to have lodged in his back. Part of the metal of the pick lodged in and through the spinal cord and through O'Brien's heart. In addition, Mr. O'Brien sustained a bullet wound in his chest.

Chief Rocco Urella of the Criminal Investigation Division of the Office of the District Attorney of Delaware County testified that on the evening of April 9, 1969 a lineup was conducted at the Media Police Station at which time one Samuel Smith, who had been a passerby at the scene of the incident, identified the respondent Wesley Groce as the individual who participated in the robbery and assault. Samuel Smith identified Wesley Groce as the individual standing behind O'Brien when the latter fell, obviously seriously wounded as a result of a stab wound (505).

Mr. Smith at trial identified Groce as O'Brien's assailant and stated he heard three shots fired. He stated there was a pause after the first shot and then two shots in succession. Samuel Smith at the suppression hearing stated he could not forget the face of the individual who stabbed O'Brien. At the time the incident took place, Samuel Smith was standing about 40 to 50 feet away from the site of the attack.

At the conclusion of the trial, the jury returned a conviction of 1st degree murder against the respondent and the jury fixed the penalty at life imprisonment.

From the judgment of sentence, the respondent filed his appeal to the Supreme Court of Pennsylvania.

REASONS FOR GRANTING THE WRIT.

The Supreme Court of Pennsylvania's Decision That as a Consequence of Certain Evidence Introduced at Trial the Respondent Was Deprived of Due Process and the Right to a Fair Trial Was Based Upon an Improper Interpretation of the Constitutional Rights Guaranteed to an Individual Defendant as Enumerated by This Court.

The sole basis of the determination of the Pennsylvania Supreme Court to grant a new trial arose from the testimony of Thomas Bruton, Chief of the Media Police who was asked, during the Commonwealth's questioning of the Chief, the circumstances under which the respondent was brought into the Media Police Station.

That portion of the examination which is here in question is as follows:

"Q. And that would be sometime after this defendant was arrested?

A. Yes, sir, it would.

Q. When the defendant was arrested, did you have occasion to bring him to the Media Police Station?

A. Sir, he came in on his own.

Q. As a result of what?

A. Through our investigation and a door-to-door check, we came up with the name Nino. Then at this point . . .

Mr. Duffy: I object to that, sir, and move to strike.

The Court: Overruled.

By Mr. Reilly:

A. Go ahead.

A. During our door-to-door check and house-to-house check, we came up with the name Nino. Then I

started to get my mind working, because in the years I have been a police officer I have heard the name Nino before. I went through a great deal of my files, and all of a sudden I thought of the name Groce, and this is where we came to the conclusion that Nino was Groce.

Q. All right. Now then did you interview witnesses who were at the scene?

A. Yes I did, sir."

In his brief before the Pennsylvania Supreme Court respondent argued that the testimony of the Chief constituted basic prejudice as suggesting the commission of other offenses by the respondent. Respondent also cited the case of *Kotteakos v. U. S.*, 328 U. S. 750, 765 (1946) to the effect that such testimony could not be construed as harmless error.

An evaluation of the above passage in the light of applicable federal rulings, results inevitably in the conclusion that the respondent was in no way deprived of his rights to due process and a fair trial. In its Opinion, the Pennsylvania Supreme Court cited its own authority in the case of *Commonwealth v. Allen*, 448 Pa. 177, 292 A. 2d 373 (1972). The essence of the Court's position is to be found in the appendix hereto p. A5.

In the Dissenting Opinion in the instant case, Associate Justice Pomeroy stated as follows (A8):

"While I subscribe wholeheartedly to the principle that a man should not be convicted of one crime by proof of his commission of unrelated past crimes, I fail to see how that principle was violated in this case. Even conceding that it is *possible* that one hearing this testimony might conclude that at some point in the past appellant had come out on the wrong side of the law, I think it unrealistic to say that a jury would seize on

testimony that a police officer knew Groce by his nickname as a consideration in reaching a verdict of first degree murder. This is to attribute a prejudicial effect not to evidence of other crimes, but to a possible inference that there was a prior police record of some sort. This seems much too remote and speculative to be the foundation of a new trial in this case. See *United States v. Hines,* 470 F. 2d 225 (3d Cir. 1972)."

It is respectfully submitted that the rationale in *Hines* as enunciating the appropriate standards of due process on the issue of evidence of prior criminal involvement is applicable here. *Hines* restates the fundamental principle precluding evidence of defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors in a pending prosecution. However, in *Hines,* the Court succinctly and intelligently notes "In deciding the admissibility of evidence, indicating *Hines'* criminal record, the potential for prejudice to him is not the sole factor to be considered. Taking into account all the attending circumstances, we must balance the degree of prejudice with the probative value of the evidence. In *Allen,* the Court expressly refused to utilize a balancing technique."

In *Hines* the Court further stated:

". . . We are not faced with a situation in which a mug-shot itself was introduced into evidence, nor one in which the word 'mug-shot' was even mentioned as was the case in *U. S. v. Reed,* 376 F. 2d 226. The inference of *Hines'* criminal record, the tendency of the identification evidence to prejudice is much weaker here and it is at most speculative that such an inference could have had any appreciable effect on the verdict of the jury."

In the instant case, the testimony of Chief Bruton had probative value in showing the background of the method and reason why the respondent came into the Media Police Station. It was hardly error to admit such evidence inasmuch as it constituted part of the legitimate investigative background with which the jury should have been made familiar.

In any event, the testimony could not be considered to have been harmful or prejudicial to the defendant in any way. The identity of "Nino" Groce could have been known to Chief Bruton for a variety of reasons, having nothing to do with the commission of crimes. This, indeed, must have been the only conclusion reached by the jury. No arrest or perpetration of another crime by respondent was referred to, insinuated or implied by the witness and no such impression was intended to be conveyed by the Commonwealth.

It is clear that no logical or reasonable inference could be drawn from the allegedly offensive testimony that respondent had prior criminal involvement. Further, as well pointed out by Justice Pomeroy in his Dissenting Opinion that even if this hiatus was in some fashion bridged and such an inference drawn, "it is unrealistic to say that a jury would seize on testimony that a police officer knew Groce by his nickname as a consideration in reaching a verdict of first degree murder." A common sense appraisal of the evidence at issue, regarded in its entirety, compels the conclusion that the respondent's rights to due process and a fair trial under the Fourteenth Amendment were in no sense abridged.

The testimony of Chief Bruton did not mention any past crimes nor did it necessarily refer to any illegal activity. See *United States v. Roland*, 449 F. 2d 1281 (1971).

CONCLUSION.

For the reasons above set forth, the Commonwealth respectfully requests your Honorable Court to issue a Writ of Certiorari to review the judgment and opinion of the Supreme Court of Pennsylvania.

Respectfully submitted,

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Appendix.

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT.

Nos. 41 and 45-50, Jan. Term 1972.

COMMONWEALTH OF PENNSYLVANIA

v.

WESLEY GROCE,

Appellant.

APPEALS FROM THE JUDGMENTS OF SENTENCE OF THE COURT OF COMMON PLEAS, CRIMINAL TRIAL DIVISION OF DELAWARE COUNTY TO NOS. 83-89 SEPTEMBER TERM 1969.

APPEAL NO. 41 ENTERED: JUNE 21, 1971.

APPEALS NOS. 45-50: ENTERED IN SUPERIOR COURT JUNE 24, 1971, AND CERTIFIED TO SUPREME COURT JUNE 28, 1971.

OPINION OF THE COURT.

EAGEN, *J.* FILED: May 4, 1973

Wesley Groce was convicted by a jury of murder in the first degree, and the punishment was fixed at life imprison-

ment. Post trial motions were denied, and sentence was imposed as the jury directed. These appeals followed.[1]

The prosecution stemmed from the attempted robbery of John Courtney and Joseph O'Brien, Esq., in Media, Delaware County, on April 7, 1969, by three young males. During the occurrence Courtney was fatally shot by one of the felons. O'Brien was stabbed and shot, but eventually recovered from the wounds.

Several assignments of error are asserted, but only one necessitates discussion.

During the trial testimony of a Commonwealth witness, the Chief of Police of Media, the following occurred:

> "[District Attorney]: When the defendant was arrested, did you have occasion to bring him to the Media Police Station?
>
> A. Sir, he came in on his own.
>
> Q. As a result of what?
>
> A. Through our investigation and a door-to-door check, we came up with the name Nino. Then at this point . . .
>
> [Mr. Duffy]: I object to that, sir, and move to strike.
>
> The Court: Overruled.
>
> [District Attorney]: Go ahead.

---

1. In the same trial, Groce was also convicted of robbery, violation of the Uniform Firearms Act, carrying a concealed deadly weapon, assault within intent to kill and conspiracy. Timely appeals from the sentences imposed on these convictions were filed in the Superior Court. Since all of these criminal charges grew out of the same occurrence, the appeals were certified to this Court. All appeals will be disposed of in this one opinion.

> A. During our door-to-door check and house-to-house check, we came up with the name Nino. Then I started to get my mind working, because in the years I have been a police officer I heard the name Nino before. I went through a great deal of files, and all of a sudden I thought of the name Groce, and this is where we came to the conclusion that Nino was Groce."

The appellant contends this testimony was prejudicial and rose to the level of reversible error, because the jury could reasonably believe he had a past criminal record. With this contention we agree.

The law is clear that as a general rule the Commonwealth cannot introduce evidence of distinct crimes against a defendant in a prosecution for a separate offense. The rule and its underlying theory were stated in *Commonwealth v. Burdell,* 380 Pa. 43, 110 A. 2d 193 (1955), wherein this Court stated:

> "One of our most fundamental and prized principles in the administration of criminal law is that a distinct crime, except under certain special circumstances, cannot be given in evidence against a defendant who is being tried for another crime. This is because the fact that a person has committed one offense is not proof that he has committed another and because the effect of such testimony upon a jury is nevertheless bound to create prejudice and an emotional reaction on their part against the defendant."

Id. at 47, 110 A. 2d at 195. The special circumstances which the *Burdell* Court spoke of are exceptions which have been developed to the general rule. For example, evidence of a different crime may be introduced to prove a common scheme or design between two or more crimes. See *Com-*

monwealth v. Foose, 441 Pa. 173, 272 A. 2d 452 (1971); *Commonwealth v. Wable,* 382 Pa. 80, 114 A. 2d 334 (1955).[2] It is also allowable in some circumstances to impeach credibility by proof of a prior criminal record. See *Commonwealth v. McIntyre,* 417 Pa. 415, 208 A. 2d 257 (1965); *Commonwealth v. Butler,* 405 Pa. 36, 173 A. 2d 468 (1961).[3]

The Commonwealth does not try to bring the challenged testimony within one of the established exceptions to the rule, but maintains the testimony did not offend the general rule because the jury could not infer past criminal activity therefrom.

In the recent case of *Commonwealth v. Allen,* 448 Pa. 177, 292 A. 2d 373 (1972), while dealing with the prejudicial introduction of photographs in the possession of the police, the Court in general discussion set forth the following rule which is equally applicable in the instant case:

---

2. In *Wable* the Court explained the purpose of the rule:

"But it is also true that sometimes there exist the 'special circumstances' which operate as exceptions to the general rule, and bring the case within the equally well established principle that evidence of other crimes *is* admissible when it tends to prove a common scheme, plan or design embracing the commission of two or more crimes so related to each other that proof of one tends to prove the others or to establish the identity of the person charged with the commission of the crime on trial,—in other words where there is such a logical connection between the crimes that proof of one will naturally tend to show that the accused is the person who committed the other." 382 Pa. 84, 114 A. 2d at 336-37.

3. The explanation of this exception was given in *Butler:*

"It has been the law in Pennsylvania for decades that whenever a *witness or a defendant* take the witness stand, his testimony may be impeached by showing prior convictions of felonies or misdemeanors in the nature of crimen falsi . . .

"This rule of evidence is founded on common sense and logic. If a defendant offers himself as a person worthy of belief, the jury has the right to know what kind of man he is—to aid in assessing his credibility. His previous record is admissible for this purpose just the same as testimony of prior reputation for veracity is evidence for the jury's consideration." 405 Pa. at 46-47, 173 A. 2d at 473-74.

> ***"We hold that after the reference to a photograph the controlling question is whether or not a juror could reasonably infer from the facts presented that the accused had engaged in prior criminal activity. . . .***
>
> "It is a fundamental precept of the common law that the prosecution may not introduce evidence of the defendant's prior criminal conduct as substantive evidence of his guilt of the present charge. It has been succinctly stated that '[t]he purpose of this rule is to prevent the conviction of an accused for one crime by the use of evidence that he has committed other unrelated crimes, and to preclude the inference that because he has committed other crimes he was more likely to commit that crime for which he is being tried. The presumed effect of such evidence is to predispose the minds of the jurors to believe the accused guilty and thus effectually to strip him of the presumption of innocence.' Commonwealth v. Trowery, 211 Pa. Superior Ct. 171, 173-74, 235 A. 2d 172 (1967). Recognizing the prejudicial effect of such evidence, there is no justification for indirectly allowing the introduction of prior criminal activity by reference to photographs of the accused. *Once it is determined that a jury could reasonably conclude from the photographic reference prior criminal activity on the part of the defendant prejudicial error has been committed."* Id. at 181-82, 292 A. 2d at 375. [Emphasis supplied.]

Thus, the operative question is whether the jury "could reasonably infer from the facts presented that the accused had engaged in prior criminal activity." The answer to this question is clear upon consideration of the testimony of the officer when he said: "[I]n the years I have been a police officer I have heard the name Nino

[Groce] before. I went through a great deal of files, and all of a sudden I thought of the name Groce, . . ." Why would a police officer from the performance of his duties recognize a name? Why would a man's name be in police files? The obvious answer is the party had engaged in prior criminal activity, and we rule the jury could reasonably infer this from the testimony. Hence, prejudicial error was committed.

The Commonwealth also contends the error was not properly preserved for appellate review, because "appellant did not object to the answer of the Chief after the initial motion was overruled." It probably would have been more astute on the part of counsel to have renewed the objection in the form of a motion to strike for specific reasons at the conclusion of the challenged testimony. However, the repetition of an objection is needless where the same or similar evidence, already duly objected to, is again offered and the trial court's ruling has indicated that an objection to such evidence will again be overruled. See 1 Wigmore, Evidence § 18, (3d ed. 1940). Additionally, after reading the record in its entirety, it is our conclusion the erroneously admitted evidence probably had a substantial influence in bringing about the jury's verdict.

Judgments reversed and new trial ordered.

Mr. Justice MANDERINO concurs in the result.

Mr. JUSTICE POMEROY Filed a dissenting opinion in which CHIEF JUSTICE JONES joins.

DISSENTING OPINION.

POMEROY, *J.* Filed: May 4, 1973

The brief excerpt, quoted by the majority, from the voluminous record of appellant's trial * reveals inept and unnecessary questioning by the prosecution and a volunteered, irrelevant answer by the police officer witness. That answer, however, does not strike me as conveying to the jury a prior police record of the defendant. It is true that there was a reference to searching police files. But the names "Groce" was linked to the name "Nino" not by reason of any file disclosure, but because the testifying officer "all of a sudden . . . thought of the name 'Groce.'" The files, apparently, were barren.

In any event, I think it clear from the record that there was no objection to the quoted excerpt. The objection that was made (and which the majority finds sufficient for the reason that it was to "the same or similar evidence") appears in the record thus:

> "[District Attorney]: When the defendant was arrested, did you have occasion to bring him to the Media Police Station?
>
> A. Sir, he came in on his own.
>
> Q. As a result of what?
>
> A. Through our investigation and a door-to-door check, we came up with the name Nino. Then at this point . . .
>
> [Attorney for the Defendant]: I object to that, sir, and move to strike."

It is apparent to me that the ground of defense counsel's objection, although general in form, as that what the wit-

* The trial consumed five trial days. Over twenty witnesses were heard, and their testmony comprises 870 pages of transcript.

ness learned through a door-to-door investigation was hearsay. It is quite certain that the objection *could not have been* to the introduction of "other crimes" testimony for the simple reason that there was no such testimony yet uttered and none apparently in the offing. When the witness later testified as to how he had connected in his memory the name "Nino" with the name "Groce", defense counsel evidently detected no prejudice and remained silent.

While I subscribe wholeheartedly to the principle that a man should not be convicted of one crime by proof of his commission of unrelated past crimes, I fail to see how that principle was violated in this case. Even conceding that it is *possible* that one hearing this testimony might conclude that at some point in the past appellant had come out on the wrong side of the law, I think it unrealistic to say that a jury would seize on testimony that a police officer knew Groce by his nickname as a consideration in reaching a verdict of first degree murder. This is to attribute a prejudicial effect not to evidence of other crimes, but to a possible inference that there was a prior police record of some sort. This seems much too remote and speculative to be the foundation of a new trial in this case. See *United States v. Hines,* 470 F. 2d 225 (3d Cir. 1972).

Accordingly I dissent.

Mr. Chief Justice Jones joins in this dissent.

IN THE
COURT OF COMMON PLEAS OF
DELAWARE COUNTY, PENNSYLVANIA.
CRIMINAL DIVISION.

NOS. 83-89. SEPTEMBER SESSIONS, 1969

COMMONWEALTH OF PENNSYLVANIA

v.

WESLEY GROCE

John A. Reilly, Esquire
Assistant District Attorney
John J. Duffy, Esquire
Attorney for Defendant

OPINION.

The defendant, Wesley Groce, was indicted for murder, voluntary and involuntary manslaughter, robbery, violation of the firearms act, carrying a concealed and deadly weapon, assault and battery, aggravated assault and battery, assault and battery with intent to kill, and conspiracy. The defendant was charged, in conjunction with two co-conspirators, viz. Alan Pierce and Ronald Jones, with the said crimes. On April 7, 1969, two (2) innocent pedestrians, John J. Courtney, a seminarian, and Joseph P. O'Brien, Esquire, a member of the Bar, while in the immediate vicinity of the Court House, were accosted by three (3) assailants in an attempted robbery. During the course

of the robbery, Courtney was shot twice (once as he laid helplessly on the ground) and O'Brien was stabbed in the back with an ice pick and then shot (also while he laid helplessly on the ground). John Courtney subsequently died; Joseph O'Brien was fortunate to survive.

The co-conspirators were separately tried, the last trial being that of the instant defendant. Pierce, the gunman, was the first to be tried and was found guilty, inter alia, of murder in the first degree by a jury; the jury imposed the death penalty. Jones was the second to be tried. Similarly, he was found guilty by a jury, inter alia, of murder in the first degree; however, in this instance, the jury fixed the punishment at life imprisonment.

The instant defendant was the third of the co-conspirators to be tried. It was and is the position of the Commonwealth that Groce wielded the ice pick in the course of the aforesaid occurrence. Prior to his trial, the defendant filed various petitions and motions which are hereinafter discussed. The trial was held before the Honorable James H. Gorbey and a jury; the trial commenced on April 6, 1970 and concluded on April 15, 1970. The defendant did not testify and no evidence was presented on his behalf. At the conclusion of the trial, the jury found the defendant guilty on all crimes charged, including first degree murder (no finding was made relative to second degree murder, voluntary manslaughter and involuntary manslaughter in light of this verdict). After further argument, the jury fixed the punishment at life imprisonment. Subsequently, the defendant filed a Motion for New Trial and a Motion in Arrest of Judgment. These are presently before the Court for determination. As aforesaid, the instant matter was tried before a judge and jury. Argument on the present motion was heard by the Trial Judge, the Honorable James H. Gorbey, and the undersigned. However,

after the argument on the present motions, the Trial Judge was elevated to the Federal Bench. Counsel for the respective parties have informed the Court that the undersigned could render an Opinion on behalf of the Court without further argument.

In support of his motions, the defendant advances nine (9) contentions, viz.:

(1) The evidence was insufficient to sustain the charges;

(2) The Court abused its discretion in denying the defendant's application for a change of venue;

(3) The Court erred in denying the defendant's application to suppress certain evidence;

(4) The Trial Judge abused his discretion in sustaining the Commonwealth's challenges for cause as to those veniremen who expressed conscientious or religious scruples against the death penalty;

(5) The Trial Judge abused his discretion in refusing to allow defendant additional peremptory challenges when requested;

(6) The Trial Judge erred in overruling defense counsel's objection to certain of the testimony of Chief Thomas J. Burton;

(7) The Trial Judge erred in instructing the jury concerning the principle of circumstantial evidence as it related to identification;

(8) The Trial Judge erred in refusing defendant's Point for Charge No. 10 relating to an adverse reference of fact; and

(9) The Trial Judge erred in admitting, into evidence, certain of the Commonwealth's exhibits.

A review of the record and the applicable principles of law convinces the Court that the defendant's motion must be dismissed.

First, the defendant contends that the evidence was insufficient to sustain the charges. More specifically, defendant argues that the testimony of the Commonwealth's sole positive identification witness, Samuel Smith, was seriously impeached, and/or that Smith's testimony was insufficient to prove, beyond a reasonable doubt, the defendant's identity as one of the perpetrators of the crimes charged. Defendant points to two (2) circumstances in support of these contentions. Initially, it is argued that Smith's *positive* identification testimony at trial was inconsistent with a prior written statement taken under oath. Counsel for defendant fails, in his brief, however, to set forth any of the alleged inconsistencies, alleging that it would be superfluous to do so. The record discloses that Smith testified that on the date in question at approximately 9:00 P. M., he left from the rear of his home (in close proximity to the scene of the crime) in order to go to a public telephone); that he saw three (3) young men going north on Olive Street toward Second Street walking past his driveway; and that he witnesses certain of the circumstances surrounding the shooting of John Courtney and the shooting and stabbing of Joseph O'Brien. Smith positively identified the defendant in a "line-up" and in the course of his testimony. The question of whether his testimony was consistent or inconsistent with Smith's prior statement, was in our opinion, wholly for the jury's determination. Further, the import of Smith's testimony, at trial, was to the effect that his testimony was completely consistent with the prior statement or, to the extent that any apparent variances existed, these were attributable to the following circumstances: (a) the failure of the reporter to completely or accurately

record his statement, (b) when initially questioned, greater emphasis was placed on the identity and acts of the gunman, and (c) his testimony, at trial, was given in greater detail and depth as to this defendant. Secondarily, defendant argues that Smith did not recognize the defendant when he passed him in the hallway in the Court House prior to a suppression hearing. Counsel for the Commonwealth, however, submits that this was a "set-up", when Smith was not paying attention. The record substantiates this position. We are convinced that the testimony of Smith, if believed, was properly submitted to the jury in accordance with the principles enunciated in *Commonwealth v. Kloiber,* 378 Pa. 412. Moreover, we must view the evidence in the light most advantageous to the party in whose favor the verdict was rendered, i.e., the Commonwealth, including controverted factual questions and reasonable inferences to be derived therefrom where, as here, the sufficiency of the evidence is challenged: see *Commonwealth v. Bellow,* 171 Pa. Superior Ct. 54.

The second issue raised by the defendant concerns the question of whether the Court abused its discretion in denying the defendant's application for a change of venue. This matter was previously resolved by the Court (adversely to the defendant) by two (2) Orders without opinion. In his prior petitions, defendant alleged, in essence, that a fair and impartial trial could not be obtained in Delaware County by virtue of: (a) newspaper articles (promulgated generally prior to the trials of all co-conspirators and those articles published prior to defendant's trial but after the trials of defendant's co-conspirators), and (b) the fact that one of the victims was a member of the Delaware County Bar. In further support of these contentions, defendant argues that, at trial, the regular jury panel was exhausted on voir dire, and that it was

necessary to summon talesmen in order to obtain a jury. We deem all of these contentions to be without merit. The jury was selected in accordance with all legal safeguards, and each prospective member was subjected to extensive cross-examination by counsel for the defendant. Despite defendant's allegations, it appears patent to the Court that each juror who was ultimately selected to serve was without opinion as to defendant's guilt or innocence and was able to render a fair and impartial verdict based on the evidence. The jury, in addition, was selected in complete accord with the principles set forth in *Commonwealth v. McGrew,* 375 Pa. 518, and *Commonwealth v. Simmons,* 361 Pa. 391. Moreover, the law is equally clear that the grant or refusal of a petition for change of venue is generally within the sound discretion of the trial Court. We believe that this discretion was properly exercised in the instant matter, and that defendant was tried by an impartial jury in accordance with due process.

Third, the defendant argues that the Court erred in denying the defendant's application to suppress certain evidence. This issue concerns evidence surrounding the defendant's identification in a police lineup while unrepresented by counsel. The Commonwealth, in this regard, introduced a written statement, signed by the defendant, waiving the right to counsel in this regard. In addition, oral testimony of police witnesses in corroboration of the waiver was introduced. This issue was fully litigated in a prior suppression hearing. It appears to this Court that the defendant was advised of his legal and constitutional rights and that the Commonwealth fully sustained its burden in establishing an intelligent and understanding waiver in accordance with the holdings in *U. S. v. Wade,* 388 U. S. 218; *Commonwealth v. Hoffman,* 432 Pa. 340; *Commonwealth v. Collins,* 436 Pa. 114; *Com. ex rel. Ross v. Botula,*

206 Pa. Superior Ct. 1, and *Com. ex rel. Clinger v. Russell,* 206 Pa. 436. Accordingly, we perceive no error in the prior rulings of this Court in denying the defendant's applications to suppress the evidence here in question.

Fourth, the defendant contends that the Trial Judge abused his discretion in sustaining the Commonwealth's challenges, for cause, of veniremen who expressed conscientious or religious scruples against the death penalty. In his rulings, the Trial Judge sustained the Commonwealth's challenges to jurors who indicated that they could not bring in a death verdict despite what might be revealed during the trial and despite what the evidence might be at trial. We conclude that the Trial Judge did not err in granting the Commonwealth's challenges for cause as to these matters since they clearly involved challenges for cause. Moreover, the rulings were in consonance with *Wetherspoon v. Illinois,* 391 U. S. 510, and *Bumper v. North Carolina,* 391 U. S. 543.

Fifth, the defendant argues that the Trial Judge abused his discretion in refusing to allow the defendant additional peremptory challenges when requested. This contention is predicated on the assumption that the Trial Judge erred in sustaining the Commonwealth's challenges for cause of those veniremen who expressed scruples against the death penalty, as hereinabove set forth. Based on this premise, defendant contends that he was entitled to additional peremptory challenges. As aforesaid, no error was committed in this regard. Hence, defendant's basic premise is erroneous. Nor has defendant shown any prejudice in connection therewith. Accordingly, we deem this contention to be without merit.

Sixth, defendant advances the argument that the Trial Judge erred in overruling the objection of defense counsel to certain testimony of Chief Thomas J. Burton. In the

course of Chief Burton's testimony, the following transpired:

> "Q. When the defendant was arrested, did you have occasion to bring him to the Media Police Station?
>
> "A. Sir. he came in on his own.
>
> "Q. As a result of what?
>
> "A. Through our investigation and a door-to-door check, we came up with the name Nino. Then at this point——
>
> "Mr. Duffy: I object to that, sir, and move to strike.
>
> "The Court: Overruled.
>
> "By Mr. Reilly:
>
> "Q. Go ahead.
>
> "A. During our door-to-door and house-to-house check, we came up with the name Nino. Then I started to get my mind working, because in the years I have been a police officer I have heard the name Nino before. I went through a great deal of my files, and all of a sudden I thought of the name Groce, and this is where we came to the conclusion that Nino was Groce."

From the aforesaid, defendant contends that hearsay evidence was admitted, and that the proof disclosed or tended to disclose that the defendant was guilty of the commission of other crimes and offenses at other times, citing *Commonwealth v. Bruno,* 215 Pa. Superior Ct. 407. We disagree with these conclusions. The testimony was properly admitted to show the background concerning the method by which the defendant came to the Media Police Station. Nor does the testimony of Chief Burton necessarily indicate that the defendant was guilty of the commission of other crimes. Even assuming, however, that the admission of the above testimony was error, in light of the positive

identification of the defendant and other evidence present in the instant case, at most the admission was harmless error.

Seventh, defendant argues that the Trial Judge erred in instructing the jury concerning the principle of circumstantial evidence as it related to identification. In this regard, counsel for the defendant does not take technical issue with the content of this aspect of the charge; rather, he apparently argues that no instruction should have been given since there was no circumstantial evidence as to the identity of the defendant.* Immediately after advancing this conclusion, counsel for the defendant states, in his brief:

> "Some of the eye-witnesses to the incident did express opinions as to the physical descriptions of the assailants. However, these opinions were so varied and conflicting as to be, at best, of dubious probative value."

Aside from the question of whether the above conclusion is erroneous, it appears patent to this Court that the charge on circumstantial evidence was required and necessary in light of all the facts and circumstances here present.

Eighth, defendant contends that the Trial Judge erred in refusing defendant's tenth point for charge. In this regard, defendant requested the Trial Judge to state to the jury that the prosecution's evidence revealed the existence of other eye witnesses to the crime, and that where evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and, without satisfactory explanation, he fails to do so, the jury may draw an inference of fact that it would be unfavorable to him, citing *Peters v. Shear,* 351 Pa. 521. We have no quarrel with this well

* Samuel Smith was a positive identification witness.

known principle of law; it is inapposite, however, to the instant case. Counsel for defendant refers, apparently, to certain witnesses* who were not called by the Commonwealth. The Commonwealth pointed this out to counsel for the defendant with the admonition that these witnesses could be called on behalf of the defendant, if he so desired. These witnesses were equally available to both the Commonwealth and the defendant and were not within the control of the Commonwealth. Hence, the above principle of law was inapplicable, and no error was committed in refusing the said point for charge. Nor is there any indication that the Commonwealth failed to call the witnesses in question because their testimony would have been favorable to the defendant; see *Commonwealth ex rel. Sprangle v. Maroney,* 423 Pa. 589, and *Commonwealth v. Deitrick,* 221 Pa. 7.

Lastly, defendant argues that the Trial Judge erred in admitting, into evidence, on behalf of the Commonwealth, Exhibits C-9, C-17, C-21, and C-23 through C-34, inclusive, in that the said exhibits were not "authenticated". Beyond this bare conclusion, counsel for the defendant offers neither argument nor insight into the alleged error. Exhibits C-9 and C-17 were photographs; the Commonwealth produced the photographer. Exhibit C-21 was the murder weapon; it was identified as being taken from the home of one of the co-conspirators and was identified by ballistics experts as being the gun which fired the fatal and other bullets. Similarly, the remaining exhibits in question (C-23 through C-34, inclusive) were properly identified and admitted. We find no merit in this contention.

For all of the above reasons, we conclude that the defendant's motions must be dismissed. Moreover, an anal-

* Defendant alleges that these witnesses would have been unable to make a positive identification of the defendant and that this additional *cumulative* testimony would have affected the credibility of the positive identification witness (Smith).

ysis of the record convinces us that the defendant received a trial which was fully consistent with justice, fairness and equity. Accordingly, we enter the following

ORDER.

AND Now, to wit this 23rd day of March A. D., 1971, upon consideration of the record and briefs filed on behalf of counsel for the respective parties, and after argument, it is ORDERED, ADJUDGED and DECREED that:

(1) The Motion for New Trial and Motion in Arrest of Judgment filed on behalf of the defendant, Wesley Groce, be and the same is hereby dismissed; and

(2) The defendant, Wesley Groce, shall be presented in Court Room No. 1, Court House, Media, Pennsylvania, on April 2, 1971 at 10:00 A. M. before the undersigned, for the imposition of sentence.

By THE COURT:

JOHN V. DIGGINS,
P. J.